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No. 91-761

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE PENN CENTRAL CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA, CONSOLIDATED RAIL CORPORATION and SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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Dated: February 21, 1992

TABLE OF CONTENTS

	Page
Argument	2
Conclusion	5

TABLE OF AUTHORITIES

CASES

Gardner v. New Jersey, 329 U.S. 565 (1947)	3
In re Cent. R.R. Co. of New Jersey, 950 F.2d 887 (3d Cir. December 10, 1991)	2
In re Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991)	3-4
In re M. Frenville Co., 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985)	2
Pennsylvania Dep't of Pub. Welfare v. Davenport, __ U.S. __, 110 S. Ct. 2126 (1990)	3
Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985)	2
Traynor v. Turnage, 485 U.S. 535 (1988)	3
Zulkowski v. Consolidated Rail Corp., 852 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988)	2

STATUTES

Bankruptcy Act of 1898 (repealed 1978)
Section 77; 11 U.S.C. § 205 ..... *passim*

Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")
Section 101 *et seq.*; 42 U.S.C. § 9601 *et seq.*.... *passim*

OTHER AUTHORITIES

ABI Speaker Reports, Bankr. Law Daily (BNA), June 27, 1991 4

Ralph R. Mabey & Penrod W. Keith, *Bankruptcy Practice: A View From the Benches, in 65th Annual Meeting of the National Conference of Bankruptcy Judges*, 2-9 (1991) 4

Regulatory Program of the United States Government: EPA, 596 (April 1, 1991 - March 31, 1992) 4

1A Sutherland, *Statutory Construction* § 23.10 (4th ed. 1985 & Supp. 1990)..... 3

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Petitioner The Penn Central Corporation respectfully submits this reply in support of its petition for writ of certiorari filed November 8, 1991.[1]

[1] Petitioner has included the listing required by Rule 29.1 in its "Petition for Writ of Certiorari."

1.

The government attempts to obscure the broad scope and importance of the Third Circuit's decision by characterizing its holding as "simply" that the government, in point of time, could not have filed a CERCLA claim in a bankruptcy reorganization that predated the 1980 enactment of CERCLA. Govt. opp. 6-7. In projecting the Third Circuit's holding in that simple fashion, the government can comfortably advance its contention that "[t]he issue actually presented here. . . is a narrow one." Govt. opp. 11. We submit that the fundamental errors upon which the Third Circuit's decision is based and the scope and importance of the issue presented herein cannot be so enshrouded. The exceptions that the Third Circuit has carved out from the Congressional mandate of finality for consummated plans of reorganization are not limited to, nor defined by, the timing of a reorganization. On the contrary, the erroneous basis and rationale for the ruling below has a significance of broader application and concern.

The issue presented in this case is whether companies that have been reorganized within the Third Circuit will receive the protection of the rule of finality and the "fresh start" to which they are entitled under the bankruptcy statutes. The Third Circuit answered that question "no," further expanding "exceptions" it has created to the discharge and bar of claims in bankruptcy proceedings.[2] The Court did not ground its decision on statutory intent. Indeed, a major error below was the Third Circuit's failure to come to grips with the fact that there is nothing to

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[2] The Third Circuit's holding in this case is not limited in application to the timing of the enactment of CERCLA, or even to CERCLA claims. Indeed, the Court relied upon the rationale of its earlier decisions in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir. 1985) and *Zulkowski v. Consolidated Rail Corp.*, 852 F.2d 73 (3d Cir. 1988), which in turn relied upon *In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984). None of those cases involved CERCLA claims. Likewise a subsequent decision of the Third Circuit, *In re Cent. R.R. Co. of New Jersey*, 950 F.2d 887 (3d Cir. December 10, 1991), in which the Court again concluded that claims based upon pre-petition acts of the debtor were not discharged, did not involve CERCLA.

suggest that Congress, in passing CERCLA, intended to set aside fundamental rights previously established by proceedings under the bankruptcy laws. Instead, the Third Circuit relied upon its own erroneous limited interpretation of the scope of "claims" in bankruptcy proceedings.

Section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (repealed 1978), and this Court's decision in *Gardner v. New Jersey*, 329 U.S. 565 (1947), do not support the limitations on the meaning of "claims" created by the Third Circuit. Those limitations, which emphasize concepts of "cause of action" and "legal relationship," have been almost uniformly criticized by other courts as strained and narrow, and as inconsistent with the mandate of Congress. A more faithful interpretation of Congressional intent in Section 77, as recognized by this Court, is that the definition of "claims" is so "sweeping" and "all-inclusive" as to "leave room for no exception" (329 U.S. at 573), and must encompass any claims based upon the acts of the debtor.

The difference between the Third Circuit and the courts in many other circuits (Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh) is directly presented by the issue in this case and can be disposed of by a ruling that the Third Circuit should not be making "exceptions" to the principle of finality and the "fresh start" mandated by the bankruptcy laws, absent a clear and unequivocal expression of intent by Congress to do so.[3]

2.

The government says the Second Circuit's decision in *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991) is "clearly distinguishable" from the Third Circuit's decision because of the timing of the enactment of CERCLA. Govt. opp. 8. Those opposite results, however, are not a function of the timing of passage

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[3] *See Pennsylvania Dep't of Pub. Welfare v. Davenport*, __ U.S. __, 110 S. Ct. 2126, 2133 (1990); *see also* 1A Sutherland, *Statutory Construction* § 23.10 at 346 (4th ed. 1985 & Supp. 1990); *Traynor v. Turnage*, 485 U.S. 535, 547 (1988).

of the CERCLA statute and the entry of a consummation order in bankruptcy. The underlying rationales for the two decisions cannot be reconciled.

The critical difference between the Second and Third Circuits is the treatment of claims against the reorganized company that are based upon pre-petition conduct of the debtor. In the Second Circuit, and other jurisdictions, any such claims not provided for in the plan of reorganization are barred and discharged and may not be asserted against the reorganized company. In the Third Circuit, unless essentially all elements of the cause of action are present prior to consummation, the reorganized company will suffer the consequences of the debtor's pre-petition acts. The Third Circuit's decision on this score is an anomaly of sweeping import.

3.

The suggestion of SEPTA and Conrail that reorganizations under Section 77 are a dead letter, and therefore that the Third Circuit's decision is "an inappropriate vehicle" for consideration of the issue presented (SEPTA/Conrail opp. 6), is unfounded.[4] With the recent proliferation of environmental law actions,[5] and bankruptcy filings,[6] a uniform answer is needed to

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[4] This case cannot be ignored because it is governed by Section 77 of the Bankruptcy Act. That statute continues to govern the rights of parties in cases commenced under it. There have been well over 100 reported decisions under Section 77 since 1978, nearly half of which are from federal appellate courts.

[5] Since 1980 the CERCLA cost-recovery program has referred approximately 391 cases, worth $644 million, to the Department of Justice. *See Regulatory Program of the United States Government: EPA*, 596 (April 1, 1991 - March 31, 1992). Nearly half of these cases, worth over $325 million, were referred in fiscal years 1989 and 1990 alone. *Id.* These numbers continue to increase — EPA projects a cost recovery for 1993 of $300 million. *Id.*

[6] In 1989, there were nearly 700,000 bankruptcy filings, in 1990 this number increased to 830,000 filings, and it was projected that by year end 1991, this number would exceed one million. *See* Ralph R. Mabey & Penrod W. Keith, *Bankruptcy Practice: A View From the Benches, in 65th Annual Meeting of the National Conference of Bankruptcy Judges*, 2-9 (1991); *see also ABI Speaker Reports*, Bankr. Law Daily (BNA), June 27, 1991.

the question presented in this case: can a reorganized company be held liable for the acts of its predecessor debtor in disregard of the principles of finality, the plain meaning of the bankruptcy statute and the order of the reorganization court entered years before disposing of all claims based upon the acts of the debtor?

CONCLUSION

For the reasons stated herein, Penn Central respectfully requests this Court to issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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